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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 560

SILVIO A. LANZA and VITO F. LANZA,

Appellants,

vs.

STATE OF NEW JERSEY, BY SALVATORE A. BONTEMPO, Commissioner of Conservation and Economic Development,

Appellee.

On Appeal from New Jersey Supreme Court

MOTION TO DISMISS

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Pursuant to Rule 16 of this court, appellee hereby moves to dismiss the within appeal on the grounds that it does not present a substantial federal question, that certain of the questions sought to be reviewed have previously expressly been passed on, and that the judgment below rests on an adequate non-federal basis.

Counter-Statement of the Case

On or about July 19, 1963, appellant filed a notice in this court purporting to be a notice of appeal under 28 U. S. C. §1257 (2) and (3). On September 17, 1963, by an order of the Chief Justice of the New Jersey Supreme Court, the time for docketing the case on appeal was extended to October 17, 1963.

The final determination of the New Jersey Supreme Court sought to be reviewed herein *State* v. *Lanza*, 39 N. J. 595, 190 A. 2d 374 (1963), was filed on April 23, 1963 and an application for rehearing was denied on May 27, 1963. Appellee has neither applied for, nor been granted any extensions of time by this Court within which to file a petition for certiorari.

As for the challenge to the validity of the Round Valley Act, appellants have shown that they appealed the trial court's determinations to the New Jersey appellate courts (Db6-9) but it is also significant that they appealed the same to this Court which dismissed the appeal for want of a substantial federal question. *Lanza* v. *New Jersey*, 358 U. S. 333, 79 S. Ct. 351, 3 L. Ed. 2d 350 (1959) reh. den. 359 U. S. 932, 79 S. Ct. 606, 3 L. Ed. 2d 634 (1959).

ARGUMENT

POINT I

Appellants are barred from raising questions cognizable in a writ of certiorari.

While the notice filed by appellants in this court on July 19, 1963 refers to 28 U. S. C. §1257 (3), the certiorari section, they have failed to file a petition for certiorari within 90 days of final judgment in the state court as required under 28 U. S. C. §2101 (c) and Rule 22 of this Court. An application had been made by them to the New Jersey Supreme Court for extension of time to docket their case on *appeal* (28 U. S. C. §1257 (2)) but they did not apply to a member of this Court for any extension of time to file the petition for certiorari, as required by Rule 22.

Thus, even assuming any merit in appellants' questions 2 through 8 (Db3, 4, 5), they all refer to claims of title, right, privilege, or immunity under the United States Constitution, and, as such, are cognizable only in a petition for writ of certiorari, which appellants have not filed as required by Rules 22, 34 and 50 of this court.

Appellee urges that these issues ought not to be treated as having been improvidently raised in an appeal, under 28 U. S. C. §2103, since appellants obviously were fully aware of their acts and should be bound by them. They chose to notify appellee that they were claiming review under *both* subsections 2 (direct appeal) and 3 (certiorari) of 28 U. S. C. §1257. Their election to proceed only under subsection 1 was deliberate, as evidenced not only by their specifying both routes of review, but also by their recourse to the approval of the state court in securing an extension of time, a course to be followed only in a direct appeal situation.

POINT II

This Court should not review issues that it had declined to review on a previous appeal.

In the notice of appeal to this court, filed by appellant Silvio Lanza on September 19, 1958 from the final determination of the New Jersey Supreme Court on the validity of the Round Valley Act, *State* v. *Lanza*, 27 N. J. 516, 143 A. 2d 564 (1958), appeal dismissed, 358 U. S. 333, 79 S. Ct. 351, 3 L. Ed. 2d 350 (1959), reh. den. 359 U. S. 932, 79 S. Ct. 606, 3 L. Ed. 2d 634 (1959), certain questions raised therein are raised again in this appeal. The questions raised in the instant appeal are virtually identical to the prior appeal as follows:

Questions in Instant Appeal	*Questions in Prior Appeal*
3. Does the determination by the New Jersey Supreme Court that the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 50:20-1 *et seq.* does not create a debt or liability of the State of New Jersey to certain municipalities and counties, as would require submission of the questions to voters as required by the New Jersey Constitution, 1947, Art. VII, Sec. II, par. 3, render the Act invalid as operating to deprive the appellants of their property without due process of law, and denying them the equal protection of law in contravention of the provisions of Amendment XIV of the United States Constitution?	3. Did the Legislature in enacting the Round Valley Act (C. 60 of the Laws of 1956 of the State of New Jersey; N.J.S.A. 58:20-1; as amended by Chapter 215 of the Laws of 1957); create a "debt" or "liability" of the State of New Jersey in contravention of the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution?

Questions in Instant Appeal

4. Does the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.* operate to deprive the appellants of their property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution, in that the Act contains an unconstitutional delegation of legislative powers to the Commissioner of Conservation and Economic Development?

5. Does the *Round Valley Act*, L. 1956, c. 60; N.J.S.A. 58:20-1 *et seq.* operate to deprive the appellants of their property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution, in that the Governor of the State of New Jersey

Questions in Prior Appeal

4. Is C. 60 of the Laws of 1956 of the State of New Jersey (N.J.S.A. 53:20-1); approved June 1st, 1956 repugnant to the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution, in that the same involves an unconstitutional delegation of legislative powers to the Commissioner of Conservation and Economic Development?

8. Did the Courts below err in precluding the Appellant; in contravention of the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution; from demonstrating that the Commissioner of Conservation and Economic Development had delegated to others powers attempted to be conferred upon him by the Round Valley Act, supra?

9. Did the Legislature of the State of New Jersey appropriate funds for the purposes set forth in the Round Valley Act suprs. in violation of the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution, since it does not appear that the Gov-

did not certify as required by the Constitution of New Jersey, 1947, Art. VII, Sec. II, par. 2 that there were sufficient funds on hand and anticipated for the appropriation provided in the Act?

8. Were the appellants deprived of their property in violation of the due process and equal protection provisions of Amendment XIV of the United States Constitution during the trial of the action by the following:

• • •

(d) The employment of special counsel to prosecute this action on behalf of the respondent.

ernor of the State of New Jersey had certified that there were sufficient funds on hand or anticipated for this improvement?

10. Was the employment of Special Counsel to prosecute this action on behalf of the Appellee, repugnant to the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution?

In *Lanza* v. *State*, 358 U. S. 33, 79 S. Ct. 341, 3 L. Ed. 2d 350 (1959), this court dismissed said prior appeal for want of a substantial federal question. Appellant does not make any argument nor cite any authority why this court should find otherwise in this appeal.

It is obvious, however, that, by their very nature, the questions are not reviewable by this Court. For example, questions #3 and #5 refer exclusively to an interpretation of the New Jersey Constitution which the New Jersey Supreme Court covered thoroughly. *State* v. *Lanza*, 27 N. J. 516, 143 A. 2d 571 (1958). If there is any factual basis for the argument that appellants were deprived of due process or were denied equal protection of the laws under the United States Constitution on these questions, they have not shown any evidence to that effect. Question #4, relating to the delegation of authority to the Commissioner of Conservation and Economic Development

is again exclusively a subject of State Law, having no Federal implications. cf. *Nablett* v. *Carpenter*, 305 U. S. 297, 59 S. Ct. 170, 89 L. Ed. 182 (1938); *Ohio* v. *Akron Metropolitan Park District*, 281 U. S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930); *Erie R.R. Co.* v. *Bd. of Public Utilities Commission of New Jersey*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921); *O'Neill* v. *Leamer*, 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249 (1915); *Welsh* v. *Swasey*, 214 U. S. 91, 29 S. Ct. 567, 53 L. Ed. 923 (1909). Question #7 relating to the determination by the trial court as to the valuation of appellants' nursery stock is purely a fact question on which the Jurisdictional Statement of the appellants is totally silent except that the question is merely raised, but not argued or explained. Questions #8(a) (b) and (c) refer to procedural determinations of the trial court below upon which the appellants, again, make no argument whatever in their Jurisdictional Statement.

POINT III

Appellants have not shown any vested right to have been violated by the Round Valley Act.

The New Jersey Legislature passed a bill in May of 1958 extending the time of acquisition of all Round Valley properties until December 31, 1958. L. 1958, c. 57. The original bill, passed in 1956, L. 1956, c. 60, provided, in effect, that the acquisition be completed on or before June 1, 1958. The Governor of New Jersey signed the 1958 Act into law on or about June 12, 1958. On the basis of these bare facts, appellants now contend that the twelve day hiatus somehow conferred "vested rights" upon them which were inviolate.

Appellants argue at Db10-31 that it is "hornbook law that the legislature cannot, by a statute, divest vested property rights by validating past acts and proceedings". They ig-

nore the fact that all of the legal proceedings in condemnation duly instituted prior to June 1, 1958 were conducted under the aegis of a valid and subsisting law. Hence, there was no necessity for the legislature in extending the time of taking, to validate any past acts and proceedings (Db10-31). The past acts were valid in their own right and appellants do not challenge the same. In support their argument they cite a number of cases including *Pennsylvania Greyhound Lines* v. *Rosenthal*, 14 N. J. 372, 102 A. 2d 587 (1954). That case stands for the proposition that a law cannot create a remedy covering actions which took place prior to its adoption, if at the time of the happening of such acts no such remedy existed. It further held that while statutes are deemed to operate *in futuro*, nevertheless except where there is a clear indication of legislative intent to the contrary, a remedial and procedural statute is ordinarily applicable to procedural steps in pending actions. Appellants also cite *Maxwell* v. *Goetschius*, 40 N. J. L. 383 (Sup. Ct. 1878). In that case the legislature attempted to validate a former proceeding, wholly void under then existing law, which divested persons of real property. The court, in that case, held that the statute could not apply retrospectively to such a void sale. That case, therefore, is clearly distinguishable from the case at bar. In *Coombs* v. *Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1931), also cited by appellants, proceedings had been brought during the pendency of a State constitutional provision, which was held to have conferred contractual rights upon citizens of the State. When the constitutional provision was repealed, it was held that the proceedings could continue, because of the contractual right existing when the suit was instituted. There is nothing in that case relating to any "validating" of past acts and proceedings. *Ettor* v. *Tacoma*, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773 (1913), also cited by appellants, is similar to *Coombs* v. *Getz* and does not have any application in the case at bar.

The argument is further made that, after May 31, 1958, appellants were "entitled" to believe that Silvio's lands could no longer validly be taken under the pending proceedings (Db11-25). They do not cite any authority for this position nor do they point out that the highest court of New Jersey found to the contrary, holding that the New Jersey Legislature intended a retrospective effect to the statute (assuming the same to have been required) as to this remedial aspect. This Court ought not to review that determination of the New Jersey Supreme Court which construed and interpreted its own laws. *Dohany* v. *Rogers*, 281 U. S. 862, 50 S. Ct. 299, 74 L. Ed. 904 (1930); *Roe* v. *Kansas Ex Rel. Smith*, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259 (1929); *Missouri P. R. Co.* v. *Nebraska*, 217 U. S. 196, 30 S. Ct. 461, 54 L. Ed. 727 (1910); *Devou, Executor* v. *Cincinnati Covington and Erlanger Ry. Co.*, mem. dec. 220 U. S. 605, 31 S. Ct. 118, 55 L. Ed. 605 (1911).

Appellants proceed to analogize their "vested property right" to a party's vested right where a statute of limitations had run. In support of this proposition they cite *State by Parsons* v. *Standard Oil Co.*, 5 N. J. 281, 74 A. 2d 565 (1950). That case held that a State cannot abrogate a vested property right created by a statute of limitations. In that case debts of the company in the form of certain choses in action were held not to be subject to escheat after a six year period of limitations expired. Under New Jersey law, the right to interpose the bar of the statute of limitations to actions in contract were vested property rights which no law making body could abrogate or impair. That court did observe, however, that a plea of the bar of the statute of limitations following the rule of *Chase Securities* v. *Donaldson*, 325 U. S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945) is good "only by legislative grace" and is not within the operation of the Fourteenth Amendment to the United States Constitution, which "does not make an Act

of State Legislation void merely because it has some retrospective operation". In *Chase Securities, supra*, at 325 U. S. 311, Mr. Justice JACKSON cited *Campbell* v. *Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885) for the proposition that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment may repeal or extend a statute of limitations even after the right of action is barred thereby, restore to the Plaintiff his remedy, and divest the Defendant of the statutory bar.

The question of the effect of statutes of limitation, nevertheless has no application in this case. The lands to which the appellants claim title were subject to a condemnation suit at any time, whether before, during, or after the so-called twelve day hiatus period, provided the lands would have been needed for public use. Thus, there was no vested right in appellants which was immune from intrusion by any authority having the power of eminent domain.

In *Kersten* v. *U. S.*, 161 F. 2d 337 (10th Cir. 1947) it was held that a proceeding instituted before the amendment to the Emergency Price Control Act of 1942 was valid and subsisting after an amendment to the act was passed extending the life of that Act. The amendment was passed several weeks after the original Act expired by its terms, thus demonstrating a close similarity to the facts at bar. While that amendment expressly referred to violations under the original act, and operated to revive them, the question of the validity of such a concept was raised and the court approved it. This Court, it should be noted, refused to recognize a sufficiently substantial federal question and denied review by certiorari, 331 U. S. 851, 67 S. Ct. 1727, 91 L. Ed. 1859 (1947).

Appellants have not attempted to distinguish the *Kersten* case, nor did they discuss *Milk Control Board* v. *Pursifull*,

219 Ind. 49, 36 N. E. 2d 850 (Sup. Ct. 1941), which is analogous to the case at bar and which was cited in the opinion of the Appellate Division of the New Jersey Superior Court (D22a-10). In that case a milk control law expired by its own limitation on June 30, 1941. An amendment to the act extending it for two years was not enacted until July 8, 1941, over a month after the law had expired. An action had been instituted against the defendant under the expired statute and was pending at the date of expiration (see report of further proceedings in *Board* v. *Pursifull*, 38 N. E. 2d 246 (Sup. Ct. Ind. 1941)) and upon the expiration of that Original Act, the defendant moved to dismiss the proceedings. The Court denied the motion, holding that the intention of the Legislature was clearly to continue the operation of the act and extend it. It refused to permit the delay to "thwart the purpose and intention of the Legislature."

As for Appellants' argument (Db10-24) that the facts herein might have been far different if the extending amendment to the Round Valley Act had been adopted five months, one year or two years after the original Act had expired, the point is frivolous and speculative. Had any of these hypotheses come to pass, appellants would surely, even for their own protection, have been required to move in the original proceedings in the New Jersey Superior Court for an order dismissing the action and vacating the Notice of Lis Pendens filed by the State. Thus, appellants would not have been left without their proper remedy.

POINT IV

The refusal on procedural grounds to allow Vito Lanza to intervene raises no substantial federal question.

The opinion of the New Jersey Supreme Court (D3a to D6a) clearly describes the circumstances under which Vito Lanza sought to intervene. It was almost a year after this action was commenced that Vito purportedly "acquired" an interest in appellant Silvio's lands and thereupon attempted to intervene (D3a-3). Vito's effort to intervene fell under Revised Rule 4:37-1 *et seq.* of the New Jersey Rules of Civil Practice. Under the applicable practice rules of New Jersey, the Supreme Court of New Jersey found that Vito was properly excluded (D6a-15). He was never, therefore, a party in this suit, and all arguments of Appellants respecting denial of Counsel have no application in this proceeding.

CONCLUSION

For the foregoing reasons, appellee urges that the within appeal be dismissed.

Respectfully submitted,

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